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The Rights of a Bona Fide Purchaser from a Conditional Vendee

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It is important at the outset to make clear what is meant by the terms sale and conditional sale, for we can not discuss the rights of a conditional vendee without discussing that with which the conditional vendee is associated viz: conditional sale.

A transaction involving the disposition of property for a price in money is a sale, and this sale may be either executed or executory.

An executed sale is one in which the whole matter is concluded at once by an immediate transfer of the subject by one party and of the price by the other. In such case neither party has any remedy, unless there has been either fraud, mistake, or a failure of warranty. An executed sale may also be understood to mean a sale where nothing remains to be done by either party, although it was originally executory.

An executory sale is one in which something is to be done by one or both parties. It may

be executory on both sides, or executory on one side and executed on the other; as where a sale is made on credit, or money is paid for an article which is not immediately to be delivered.

A conditional sale is an executory sale the performance of which depends upon a condition. It differs from a purely executory sale in this, that an executory sale is absolutely to sell at a future time and a conditional sale is conditionally to sell. In the one case the performance is suspended and transferred,

to a future time. In the other case the very existence and performance of the contract depends upon a contingency.

A condition may be either precedent or subsequent. A condition precedent is one which must happen before either party becomes bound by the contract. A condition subsequent is one which will defeat and annul the contract by subsequent failure thereof.

Though the above distinction seems more exact than to classify the subject of sales into two parts viz: sales and

conditional sales, yet for convenience I shall use the term sale as above defined, and the term conditional sale to include both conditional as defined and executory sale; because otherwise I would be compelled to coin a new word executory under which besides bring new sounds onward. I do not, however, wholly discard the distinction between those terms only doing so where to preserve it would be cumbersome.

The law on this subject is somewhat in con-

fusion. Not only do the decisions of one state conflict with those of another, but there can be found in any one state apparent conflicts of authority. In a short article of this kind it would be impossible to make an exaustive presentation of the law in the whole United States. I shall, therefore, confine my investigation to the state of New York.

After a careful investigation of the cases I lay down the following rule, which will serve as a guide through the difficult

cases, as a dividing line on one or the other side of which the cases may be classified. The rule is as follows: when it can be made clear from the intention of the parties, as formulated in their contract, that the vendor was to rely upon his remedy, and not upon the performance of the condition by the other party, then the title passes at once to the vendee who can give a good title to a bona fide purchaser for value.

But where reliance has been placed on the performance of the promise, and not on the remedy, title does not pass to the vendee, and he can give no better title to a bona fide purchaser than that which he had. To put the above statement briefly a bona fide purchaser gets a good title only when his vendor acquired the property by an actual sale. When the original transaction was conditional a purchaser gets no better title than

his vendor had.

With these few preliminary remarks I shall present the important cases to uphold the proposition above laid down.

In Ballard v Burgett 40 N. Y. 314, decided in 1869, the plaintiffs sold to F. a yoke of oxen, and it was agreed that the oxen were to remain the property of the plaintiffs until they should be paid for by F, the latter in the mean time having possession. F. afterwards, but before he had paid for them, sold the oxen to the defendant

who paid a full price and bought in good faith, without notice of the plaintiffs' rights. It was held that the defendant acquired no title as against the plaintiffs. The judge argued that possession by a vendor without title is not sufficient to confer title upon a purchaser from him; that the existence of an executory contract, by which a vendee not in possession may acquire title upon the performance of some act by him, will not enable him to confer

title upon a purchaser from him. If neither of these facts, separately considered, will enable a vendor to confer title it is impossible to produce such a result by uniting them in a vendor. Had the ouster died without fault of F. no action could have been sustained by the plaintiffs for the purchase money. This case upholds the latter part of the rule, that the plaintiffs were not relying upon the remedy, but upon the performance of the

condition; therefore title had not passed to the conditional vendee, and the purchaser from him acquired none.

In Hait v Greer 26 N.J. 556, decided in 1868, the facts as stated are: C. sold and delivered a horse to one B. and took his note for $100.00 therefor, payable in five months with interest. Directly under the note, and on the same piece of paper, was a memorandum, signed by B, as follows: "Given for one bay horse; the said Mrs C. holds the said horse

as her property until the above note is paid." Mrs C. transferred the note, with the memorandum, before due to the plaintiff, calling his attention to the memorandum, and stating that the note was guaranteed or as good as guaranteed. B. sold and delivered the horse to the defendant for a consideration, and without notice to the latter of the condition attached to the sale. The fair intendment from the above facts is, that Mrs C. intended to sell and deliver

the horse to B; and to transfer the title to him, taking back from him security for the payment of note given for the purchase price in the nature of a chattle mortgage upon the horse. If the horse had died that would have been no defense to an action on the note. It was quite clear that Mrs C. was relying upon her remedy, this inference being drawn from the words "The note is secured or as good as secured." Title, therefore, passed to B.

who could and did
give a good title
to a purchaser from
him.

In Comrs v. Cunningham
77 N. Y. 391, decided in
1879 the plaintiffs sold
to Williams, a business
correspondent of the
firm of Cunningham
& Co. a quantity of cotton
for cash. The vendors
delivered a portion
of the cotton on
board a steamer
for New York and
a bill of lading
was given therefor.
This bill of lading,
with a sight draft
attached, drawn

upon C & Co., payable to the order of B. and H. and indorsed by B. and H., was presented to C ~~& Co~~. C & Co. paid the draft, and received the bill of lading. The payment of the draft was an advance upon the cotton on the faith of the bill of lading, there having been no actual delivery of the cotton. C & Co. had no knowledge of any claim on the cotton, and upon the evidence they were found to be bona fide

purchasers in good faith. Judge Rapallo in his opinion says "the plaintiff contends that the effect of incorporating the statute into the contract was to make the sale to Williams a conditional one, but I apprehend that this is not an accurate view. The sale was a present absolute sale; not executory nor depending upon any contingency." This case is thought to be in conflict with the doctrine laid down in

Ballard v. Burgett and that line of cases. Authors have classified it under the head of conditional sales.

The Judges words are so clear and unequivocal that no confusion ought ever to have occurred. He says "this transaction is an absolute sale, not executory nor depending upon a contingency". I think it is safe to say that no one ever asserted that an absolute owner of goods could not give a good title. I must make no

argument to show from the facts whether or not this was a conditional sale, because that was so found in the opinion. This being an absolute sale it really does not belong to the class of cases which I am studying; but in view of the fact that it is usually classed as a conditional sale I thought it best to be explained.

In this connection I wish to comment upon the expression "conditional delivery". Judge Rapallo says

"It simply made the delivery conditional."
The same expression is found in Benjamin on sales where he attempts to explain the rights of a man who purchases from a conditional vendee, stating that the cases, which are thought to be in conflict, can be explained on the ground that the delivery was conditional. It can be easily established that the delivery is no trust, furthermore that there is no such thing as a condit-

ional delivery. A delivery is an act which either takes place now and once for all, or does not take place at all. a delivery implies a change of possession, and, there must be a change which is a delivery or no change which is not a delivery. There can be no middle ground. There may be a delivery with an agreement that the title is not to pass or is to pass upon the happening or not happening of some event. But Judge Rapallo did

not use the word delivery in the sense of passing title, because he found the sale absolute and unconditional. Now it is impossible to have a sale absolute and unconditional, and at the same time to have the title in the vendor conditioned by having a conditional delivery. He is therefore inconsistent in finding an absolute sale and a conditional delivery, if he meant to use the word delivery in the sense of passing title.

But from the facts of the case it is easily seen that the sale is an absolute one, therefore the finding that the delivery was conditional must be rejected as of no force or effect. To repeat, there is no such thing as a conditional delivery.

Taking up the cases again, that of Austin v Alyea 46 A. S. 500, decided in 1871, is as frequently cited in briefs as Ballard v Burgett. The plaintiff in this action agreed with M. to let him have the oxen at one

dollar per day while in use; that at the same time it was agreed, that if M. should deliver to the plaintiff a give quantity of boards within a specified time the oxen should become the property of M. But if he should not deliver the whole quantity the plaintiff should take what he should deliver at an agreed price per thousand, to be applied in payment for the use of the oxen. The oxen were delivered but the full quantity of lumber

was not. The plaintiff's claimed title under a mortgage given by M. The opinion in substance is as follows: While as a rule an individual can transfer no greater interest, or better title to property than he has, some exceptions have been engrafted upon the rule. Some of these exceptions are parts of the common law, and are confined to negotiable instruments for the payment of money, and others reach the cases of property delivered by the vendor

to the vendee, with intent to vest the title, although the conditions of the sale have not been fully performed; but this case is not within any of the exceptions. On the contrary it is well established, that neither an ordinary bailee of property, nor one having possession under an executory agreement to purchase, can give a title thereto to a purchaser, although the latter acts in good faith and parts with value without knowledge or notice of the want of title of his

vendor, or that third persons have claims upon the property. I have given this argument at some length because it states the true and uncontroverted doctrine. This case, I repeat, follows Ballard v Burgett and neither of them have ever been really questioned. Really questioned is used because some judges and some authors have thought that there was a conflict between this case and Conner v Cunningham, and consequently they have attempted to reconcile

the cases on our ground or another.

In Winterminster V Lane 27 Hun 497, decided in 1882, the plaintiff sold and delivered to one Mary Apgar an organ and stool, taking in payment therefor her two promissory notes for ninety dollars each, payable to him or his order, one in one year and the other in two years from date, with interest. At the same time Mary Apgar executed a paper by which she acknowledged that she had leased the

organ and stool from the plaintiff until the amount of the notes should be paid, from which time the notes were to be considered as a receipt in full for the instrument. One of the notes was subsequently paid in full; the others together with the lease was transferred before maturity, and for value, to one Davis, who recovered a judgment for the balance due, upon which an execution was issued and levy made upon the organ. But

proceeding was subsequently discontinued by Davis. Thereafter the case and judgement and the note upon which it was recovered were reassigned to the plaintiff. Prior to the recovery of the judgement, however, Hargrave had sold the organ and stool to the defendant for a good and sufficient consideration. The plaintiff brought an action to recover the organ and stool upon the ground that the title remained

in him.

This case follows Commrs v Cunningham. The transaction is plainly an absolute sale with an attempt by means of the so called lease, to retain security for the purchase price. There was no realising, although there is an attempt by the word lease to give the transaction a meaning which it did not have. The real intent was that Mrs Organ should purchase and that the plaintiff should have security on the organ.

In no possible way can a condition the performance of which would have to be relied upon to come within the rule be found in the statement of facts.

In Pfeffer v Reeves 35 Hun 480 decided in 1885 the plaintiff delivered to one B a soda water apparatus, and received from him a written instrument by which B acknowledged that he had "hired, leased, and received" the apparatus from the plaintiff for a term, and by which he

also promised and agreed to pay to the plaintiff for the possession and use thereof a certain amount as rent; to be paid partly in old apparatus, remainder in installments set forth in several notes. The agreement provided, that the property should not be removed, nor the interest of the lessee be transferred, without the written consent of the plaintiff. Upon full payment of all the notes all claims and title to the property on the part of the plaintiff

were to cease, and the whole title was to vest in the lessee as owner. Upon any breach of the provisions of the lease by the lessee the lease was to terminate, and the plaintiff was to be entitled to retake the property.

There are two opinions in this case holding that the transaction is an executory sale and, one dissenting opinion holding that the transaction is a sale. The substance of the prevailing judges' opinions is that there was an agreement to sell

upon the performance of the conditions stipulated in the written instrument; that the property was to be held under the lease which entitled the lessee to possession so long as he paid the rent, but upon default the right to possess and to use was at once to terminate; that the instrument was not in the nature of a mortgage or mere security. Judge Brady who wrote the dissenting opinion was not able to distinguish this case from Hunter v. Hunter

v Lane. It must be acknowledged that this is a close case and one difficult to construe. However that may be for my present purpose it is sufficient to note that the three judges had in mind my proposition. One of the prevailing judges called the transaction a conditional sale, the other made it out an executory sale while the judge who dissented thought it a sale. The two former decided that no title passed which upholds the rule that when the sale is executory or conditional no title passes

to the vendee and consequently a bona fide purchaser gets none.

Dows v Kidder 84 N.Y. 121 decided in 1881. Here the plaintiffs contracted to sell to A a quantity of corn to be paid for in cash on delivery. At the request of A plaintiffs caused a portion of the corn to be loaded on board a vessel, for their own account, and received the weigher's return, which they endorsed and delivered to A., to enable him to procure bills of lading in his own name and

to sell his exchange drawn against the same; it being agreed that the title of the corn should not pass until payment, which was to be made on that day. A procured the bills of lading, which he transferred to the defendants as a security for three bills of exchange, drawn against the corn, forming part of a parcel of exchange sold to defendants by A. The defendants paid to A a portion of the proceeds of the exchange so purchased, and forwarded the three

bills with the bills of lading to their correspondents. On the same day plaintiffs notified defendants that they were the owners of the corn, and demanded of the same the bills of lading, or that defendants should agree to account to them for the proceeds; defendants refused. The defense was that defendants bought and paid for the corn in good faith without notice. Held that no title passed to A.

Judge Clamforth held

that no title passed from the plaintiffs to A because payment was to be made in cash upon delivery. Payment was thus made a condition precedent, and until the condition was performed the title could not be affected. This case plainly shows that, where the intent is to rely upon the performance of the condition precedent, title does not pass.

Parker v Baxter 86 N.Y. 586, decided in 1881. This action was brought by the plaintiffs who compose the firm of Parker

and Howland, against the members of the firm of Archibald Baxter & Co., and the members of the firm of Brown Brothers & Co., to determine who was entitled to the proceeds of a quantity of corn in the hands of Brown Bros. & Co. The corn in question was sold and delivered by plaintiffs to Baxter & Co.; plaintiffs claimed to be entitled to retake it upon the ground that the delivery was obtained by fraud, and that such delivery was conditional. Brown Bros. & Co. claimed as bona fide

pledgees of the corn, alleging that they purchased a bill of exchange drawn by Baxter & Co. for which the corn was a security.

The facts found that plaintiffs and Baxter & Co had had numerous dealings with each other, the plaintiffs selling to Baxter & Co. corn and other produce, and that their course of business was, when corn or produce was sold for export, to have such produce placed by plaintiffs on board the vessels designated by Baxter & Co., and ship

receipts and measurer's certificates taken therefor by the vendors. The delivery of these documents to the venders with the ships receipts indorsed, constituted a delivery of the goods. When payment was to be made in cash, such payment was to be made on the Wednesday or Saturday succeeding such delivery, and delivery before nine o'clock A.M. of any Wednesday or Saturday entitled the vendors to payment on the day of delivery. The bill heads read

thus: "Cash on delivery, and merchandise billed is not to be deemed and taken as delivered nor title passed until paid for, without regard to possession." On the 5th day of August Baxter & Co. designated two vessels on board of which the corn should be laden. The corn was delivered accordingly on board the designated vessels and masters certificates taken by the plaintiffs on August 6th. These receips entitled the holders or indorsers, to receive bills of lading for

the corn, made out according to the instructions. On Friday afternoon august 6, a clerk of Baxter & Co. called upon the plaintiffs for the ship's receipts, which Mr Baxter, one of the plaintiffs refused to deliver without a positive assurance of prompt payment, assinging as a reason a delay in some previous transaction. during the same afternoon Mr Parker called at the office of Baxter & Co., with said ship's receipts indorsed in blank, and mentioned to the defendant Baxter the delay of payment on a prior occasion,

and stated that he wished to be sure that Baxter & Co. would pay for the corn early the next morning. Baxter replied that such payment would be made, and the plaintiff Parker thereupon delivered to him the ship's receipts indorsed.

The court adopts the reasoning laid down in previous cases on the question of delivery in passing title to the effect that where goods sold to be paid for in cash or notes on delivery, if delivery is made to

to the purchaser without cash or notes being given or demanded at the time, the presumption is that the condition is waived, and that a complete title vests in the purchaser. But this presumption may be rebutted by proof of such declarations or acts of the parties connected with the circumstances of the case as show an intention that title should not pass until performance of the condition. An express declaration of an intention to insist upon the

performance of the condition is not necessary. Such intention may be inferred from the acts of the parties and circumstances of the case. The judge further argues that the delivery of the shipping receipts by Parker to Baxter on the 6th of August, on his promise to pay on the next day, was presumptive evidence of giving credit for the price, and, standing alone such presumption would be conclusive. The bills, however, was a circumstance tending

to rebut that presumption
He further says if attention
had been called to the
drafting of the bills, and
it had been stated that
the delivery was made
in accordance with
its terms, there would
have been no room
for doubt as to the
intention of the parties,
and the referee would
have been bound to
observe. The legal rule,
that such intention must
govern, and to find ac-
cordingly. The conclusion
is reached that the object
of Mr Parker's call appears
to have been to secure
the personal assurance

of Mr Baxter that the price would be paid the next day, and on receiving that assurance he left the documents, going away apparently satisfied. Under these circumstances one can not say that the intention of the parties was so conclusively proved that the referee could not pass upon it as a question of fact and that there was no evidence in the case which can sustain his conclusion that the title passed absolutely.

I have stated in

substance at great length from this case because it is comparitively a late one and furthermore because stress is laid upon the intention of insisting upon the performance of the condition as one of the controlling elements in determining this class of cases.

It is needless to state that the plaintiffs were beaten in this action. This case conforms exactly with the rule laid down in the early part of this essay.